No. 14037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased, *Appellee.*

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Idaho Central Division

HONORABLE CHASE A. CLARK
United States District Judge

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The death of plaintiff's intestate was caused and brought about by his own negligence, which was the direct and proximate cause of his death. Plaintiff's intestate was the engineer in charge of an *extra* freight train which collided with the rear end of another *extra* freight train, which was stationary and within *yard limits* at Arrow, Idaho. The collision occurred in broad daylight with no impairment to vision as the result of weather conditions. Immediately prior to the collision the deceased engineer was operating his train at a dangerous and excessive rate of speed, in violation of specific operating rules of the appellant requiring extra freight trains to Operating Rules define restricted speed as folmove at *restricted speed* within yard limits. The lows: (Italics supplied.)

> "Proceed prepared to stop short of train, obstruction or anything that might require the speed of a train to be reduced."

TABLE OF AUTHORITIES CITED

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STATEMENT AS TO JURISDICTION

This is a suit arising under the provisions of the Federal Employers' Liability Act. (45 USCA, Sec. 51 et seq. (R. 3.)

Appellant was engaged in interstate commerce and the deceased engineer at the time of his death was operating appellant's train in interstate commerce. (R. 4-5.) Appellant in its answer admitted that at the time of the collision it was engaged in interstate commerce and that the deceased engineer was engaged in interstate commerce. (R.10.) Jurisdiction is unquestioned.

STATEMENT OF THE CASE

Appellee, as the Administratrix of the Estate of A. E. Mely, Deceased, brought action in the District Court of the United States, for the District of Idaho, Central Division, to recover damages in the sum of $35,000.00 for the alleged wrongful death of her husband. The case was submitted to the jury for determination and a verdict in the sum of $15,000.00 was returned in favor of appellee. (R.13.) Judgment thereon, plus costs, was entered. (R.13-14.) The decedent engineer was in charge of one of appellant's extra freight trains, No. 6015. The four Diesel units and a caboose left East Lewiston, Idaho, at 10:35 A. M. on the 11th of November, 1951. (R.67.) It proceeded easterly to the station of North Lapwai where it picked up 15 freight cars. (R.68.) It continued on towards Arrow, Idaho, where it had orders to pick up additional cars. R. 121-122.)

Extra freight train No. 1648 had preceded No. 6015 out of East Lewiston, departing therefrom between 9:15 and 9:20 A. M. Leaving East Lewiston it consisted simply of the engine and a caboose. (R. 39.) At Forbay, which is two miles east of East Lewiston, it picked up some 86 cars. (R. 40.) Departing therefrom it did some intermediate switching at North Lapwai, Idaho, and then continued on to Arrow, Idaho, arriving there

at approximately 10:40 or 10:45 A. M. Some additional cars were picked up at that point by the crew of No. 1648. (R. 40-41.)

Within the yard limits of Arrow, Idaho, No. 6015 crashed into the caboose of No. 1648 which was stationary at the time. The collision occurred at 11:10 A. M. (R. 45.)

Appellant introduced in evidence a map (Exhibit, 22) which embraces an area beginning at the east end of Bridge 126 shown thereon and includes the entire yards at Arrow station. (R. 184.) As shown on the easterly end of the exhibit, there is a yard limit sign. (R. 184.) One mile west thereof is a warning board indicating that the yard limits begin one mile distant therefrom. (R. 185.) Within the yard limits and on the north side of the track there existed a curve and bluff; the east end of the bluff was approximately 1080 feet from the point of collision. (R. 188.) South of the main line track, on which No. 6015 was traveling, is a passing track; standing thereon were six or eight box cars west of the west end of the caboose. (R. 59.) These cars, however, in no wise impaired the vision the deceased engineer would have of the rear end of the caboose when he was 980.3 feet westerly thereof. (R. 188.) In other words, decedent had this distance in which to stop his train had he been moving at restricted speed.

There was introduced in evidence what is designated as The Consolidated Code of Operating Rules and General Instructions. (Ex. 24; R. 154.) The decedent engineer was thoroughly familiar with these rules. (R. 181-182.) They controlled the operation of his train at the time and place in question.

Rule 93, which was violated by the deceased engineer, is set out in its entirety:

> "93. Within yard limits the main track may be used, clearing first class trains when due to leave the last station where time is shown. In case of failure to clear the main track, protection must be given as prescribed by Rule 99.
>
> Within yard limits the main track may be used without protecting against second and inferior class, extra trains and engines.
>
> Within yard limits second and inferior class, extra trains and engines must move at restricted speed.
>
> Within yard limits when running against the current of traffic or on a portion of double or three or more tracks used as a single track, all trains and engines must move at restricted speed."

The applicable portions of said rule insofar as it pertains to the instant case are paragraphs 2 and 3.

The term "restricted speed", as used in the rule is defined in the Consolidated Code of Operating Rules (Ex. 24) as follows:

> "Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced." (Ex. 24, page 9.)

The following material facts are undisputed:

1. Trains No. 1648 and No. 6015 were extra trains. (R. 166, 57, 200.) In the Consolidated Code an "extra train" is defined as follows:

> "Extra Train.—A train not authorized by timetable schedule. * * *" (Ex. 24, page 6.)

2. The collision occurred within yard limits. (Ex. 24.)

3. Train No. 6015 immediately prior to the collision was not being operated at restricted speed; this for the reasons that

(a) After being "dynamited" (R. 75) it still continued on its course and crashed into the caboose;

(b) 1300 feet from point of collision and within yard limits the speed of No. 6015 was 47 miles per hour. (R. 227.) (Defts. Ex. 27—speed tape on Engine No. 6015.)

(c) There was no decrease in the speed of No. 6015 from the yard limit board until after the train had been dynamited. (R. 96.)

(d) Had No. 6015 been operated even at a speed of

30 miles per hour it could have been brought to a stop within 700 to 800 feet. (R. 229.)

(e) The maximum rate of speed permitted freight trains on the entire line of railway in question was 30 miles per hour. (R. 176-177.)

4. The deceased engineer knew that he had to make a stop at Arrow for the purpose of picking up cars at that point. (R. 126.)

The complaint contained twelve specific acts of alleged negligence on the part of the appellant. (R. 6-7.)

During the course of the trial the Court permitted the complaint to be amended by an additional count charging the appellant with negligence in the violation of Rules 99, 101 and 108. (R. 141.) These rules read as follows:

> "99. When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees. When recalled and safety to the train will permit, he may return.
>
> When the conditions require, he will leave the torpedoes and a lighted fusee.
>
> The front of the train must be protected in the same way when necessary by the forward brakeman, fireman, or other competent employe.

When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection. By night, or by day when the view is obscured, lighted fusees must be thrown off at proper intervals.

When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used. Conductors and engineers are responsible for the protection of their trains." (Ex. 24, p. 47.)

"101. Trains must be fully protected against any known condition not covered by the rules, which interferes with their safe passage." (Ex. 24, p. 50.)

"108. In case of doubt or uncertainty, the safe course must be taken." (Ex. 24, p. 55.)

In support of the contention that the Company had violated the foregoing rules, appellee called as a witness Merle C. Maury who testified in answer to a hypothetical question (R. 141 et seq.) as to what "Operating Rules and General Instructions of the Northern Pacific Railway Company would be applicable" to the situation existing immediately prior to the accident, that Rules 99 and 108 governed (R. 148 et seq.); in other words, the attempt was made to show that these rules had been violated by Eddie Feehan, the conductor in charge of No. 1648, who was killed in this collision.

Following the denial of appellant's motion for a directed verdict made at the close of appellee's case, the Court withdrew from the consideration of the jury counts 2, 3, 4, 5, 6, 7, 8 and 9, leaving counts 1, 10, 11 and 12. (R. 181.) These counts follow:

(1) Failure to provide A. E. Mely a safe place to work;

(10) Failure to give A. E. Mely any warning of any kind whatsoever of the obstruction and danger ahead, as herein alleged;

(11) Failure to place men, flares or signals to give warning of said obstruction of said track a reasonable distance from said obstruction so that A. E. Mely would and could have brought his train to a stop in ample time to avoid the collision;

(12) Failing to properly protect Train No. 1648 while it was in such obscure position aforesaid, and in failing to protect Train No. 6015 from colliding therewith by notice, signal, warning, flares, orders or any other kind of notice sufficient to warn A. E. Mely of the obstruction of said main line track.

Following the denial of appellant's motion for a directed verdict, made at the close of all the evidence (R. 235), appellant separately moved the Court to withdraw from the jury's consideration counts 1, 10, 11 and

12. In addition thereto appellant moved the Court to withdraw from the jury's consideration the count charging a violation of Rules 99, 101 and 108 upon the ground that there was no evidence that said rules had been violated or that their violation in any manner contributed to the death of the engineer. This motion was denied. (R. 235-236.)

Upon this state of the record it is the contention of appellant that the deceased engineer was guilty of negligence as a matter of law and that its motion for a directed verdict, made at the close of all the evidence, should have been granted and that its motion to set aside the verdict and judgment, or in the alternative for a new trial (R. 14 et seq.) should have been granted.

SPECIFICATIONS OF ERROR

I

The District Court erred in denying appellant's motion for a directed verdict. (R. 235.)

II

The District Court erred in denying appellant's motion to set aside the verdict and judgment or in the alternative for a new trial. (R. 14 et seq.)

III

The District Court erred in entering judgment on the verdict. (R. 13.)

IV

The District Court erred in failing to give appellant's Requested Instruction No. 6 (R. 11):

> "The defendant has introduced in evidence what is designated as Rule 93 of the Consolidated Code of Operating Rules and General Instructions:
>
> 'Within yard limits, second and inferior class, extra trains and engines must move at restricted speed.'
>
> The defendant has also introduced in evidence the following definition set forth in the Consolidated Code of Operating Rules and General Instructions:
>
> 'Restricted Speed—Proceed prepared to stop short of train, obstruction, or anything that may require the speed of the train to be reduced.'
>
> I instruct you that said rule was in force and effect at the time Engineer Mely was operating Engine No. 6015 and that said rule was promulgated for the safety of Engineer Mely, his fellow employees, and the public.
>
> I further instruct you that in the operation of Engine No. 6015, it was the duty of plaintiff's decedent, A. E. Mely, the engineer, to abide by this rule and to operate his engine in accordance therewith.
>
> I further instruct you that if you find from the evidence that Engineer Mely violated this rule, then he was guilty of negligence.

If you find from the evidence that such negligence was the sole and proximate cause of his death, then your verdict should be for the defendant."

V

The District Court erred in submitting fo jury determination the question of whether or not appellant was negligent in failing to furnish deceased engineer with a safe place in which to work. The portion of the Instruction which is complained of is as follows:

"A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required of a railroad company in the exercise of ordinary care, to furnish its employees a reasonably safe place within which to work, increases or decreases as to the dangers that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary and in the absence of circumstances that caution him, or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work, and he may rely and act on that assumption." (R. 247.)

The appellant timely moved to have this charge of negligence (Sub-division 1, paragraph V of the Complaint) withdrawn from the jury's consideration on the ground that there was no evidence to sustain the submission of such an issue. (R. 235.)

VI

The District Court erred in submitting for jury determination the question of whether or not the appellant had violated Rules 99, 101 and 108. The portion of the Instruction complained of is as follows:

> "There has been introduced in evidence what is designated as Rules * * * 99, 101, 108 and other general rules read to you from the Consolidated Code of Operating Rules and General Instructions. You are advised that these rules are promulgated by the railroad companies for the safe operation of their trains and do not have the effect of law.
>
> You are further advised that it is for you to determine whether or not such rules are reasonable and regardless of any violation of the rules, whether the defendant was negligent in any manner and whether the negligence was the proximate cause of the death of the deceased Mely and whether the plaintiff Tillie Mely was damaged thereby." (R. 247-248.)

The appellant timely moved to have this charge of negligence withdrawn from the jury's consideration for the reason and upon the ground that there was no evidence that the company had violated any of its operating rules and no evidence that the death of the engineer was caused by any rule violation by the company, its agents or employees. (R. 236.)

VII

The District Court erred in permitting so-called ex-

pert testimony over appellant's objection to the effect that the appellant was guilty of rule violation which contributed to the death of the deceased engineer.

"Q. Now, Mr. Maury, under the facts as presented here in the Court Room, under what rule, in your opinion would you proceed in protecting, if necessary, within the yard limit at Arrow Station?

MR. McKEVITT: I object to that question on the ground that it is not properly framed and I object to it on the second ground that it is an attempt to establish a rule violation by the Northern Pacific Railroad Company, which rule violation will probably be urged as the cause of Mr. Mely's death, when that rule violation has not been pleaded in the complaint. As I pointed out to your Honor, there are twelve separate subdivisions of negligence contained in paragraph five of this complaint, and not in one of them, nor in any place in this complaint have we ever been apprised, until this moment, that the Northern Pacific was going to be charged with this man's death because of a violation of a rule which the Northern Pacific had established for this man's protection. (R. 139.)

THE COURT: The last part of your objection will be overruled; the first part will be sustained. I think the proper way to ask this question would be to assume certain facts and then ask it." (R. 140.)

* * *

"Q. Now, assuming as true the following facts, that on November 11, 1951, extra train No. 1648 left East Lewiston at 10:35 a. m., and proceeded easterly into the yards and to the Station at Arrow

in the State of Idaho, and while at Arrow the crew switched cars onto the main single line track within the station yards and built up a train of 85 cars with a caboose at the west end thereof, and with a locomotive at the east end thereof, standing upon the track in front of the Station House; that at that time and immediately before, there was on the south side of the track a siding which contained 15 box cars which were about 346 feet —that is, the most westerly car of the box cars on the siding were about 346 feet west of the caboose on the main line; that the 85 cars and caboose were stationary; that that train had been in the yards for about 25 minutes; that just west of this caboose standing on the main line, 604 feet, was a switch; that west of the switch commences a curve and looking at the curve it is a left curve and then it goes into a right curve around a cliff; that the railroad has no block system between East Lewiston and Arrow station; that this was a Sunday, in which there was no knowledge on the part of that crew, stationed within the yards, that a train had left East Lewiston that morning, following their train, and with the knowledge that extras do run over that track on Sundays, under those circumstances and the further fact that the end forty or sixty cars of the 85 cars standing on the main line track were logging cars, about as high as an ordinary flatcar. Under those circumstances what rule, in your opinion, of the Consolidated Code of Operating Rules and General Instructions of the Northern Pacific Railway Company would be applicable? (R. 141-142.)

MR. McKEVITT: I desire to object to the hypothetical question on the following grounds:

1. They have injected into this case issues not contained in the complaint.

2. That they have not sufficiently qualified this witness to testify on the matters and things contained within the hypothetical question.

3. That this witness is not qualified to testify what rule is applicable and what rule is not applicable.

4. There has been no evidence introduced here which would indicate in any manner that a rule violation by the Company was or could have been the proximate cause of this man's death. If the objection is not well taken, or any portion of it, in addition, I object to the form of the question as not containing all of the factors required in a hypothetical question under the conditions as they exist. Now, if the objection is not well taken I desire to examine the witness on voir dire.

THE COURT: The objection will be overruled." (R. 143.)

* * *

"BY MR. SHONE:

Q. Now will you answer the hypothetical question—do you remember the question I put to you?

A. Yes, I think I do.

MR. McKEVITT: I have already made my objection on several grounds.

THE COURT: Yes, you have, go ahead.

Q. What rule, in your opinion, would govern that situation?

A. Could I explain in my own words?

Q. You just tell me what rule first?

THE COURT: I think you should let him explain it in his own words.

MR. SHONE: Yes, O.K.

A. In various examining cars I have been in oral examinations and written examinations, they always stress one point, that is rule 108.

MR. McKEVITT: Your Honor, I object to this as not responsive, he was asked what rule would govern.

THE COURT: I believe I will let the witness go ahead.

A. The reason I referred to rule 108, it is the rule that says in case of uncertainty or doubt follow the safe course. Well, that's a general rule, whenever in case of uncertainty or doubt, you follow a specific rule which is 99 the flagging rule to protect your own train. (R. 148.)

Q. And that is the rule you would have followed, in your opinion, under these circumstances?

A. Yes, sir.

MR. SHONE: We offer in evidence rule 99.

MR. McKEVITT: We object as incompetent, irrelevant and immaterial and not within the issues.

THE COURT: It may be admitted and you may read it into the record.

MR. SHONE: Rule 99 of the consolidated code

of operating rules and general instructions found on page 48.

MR. McKEVITT: That does not apply.

MR. SHONE: Just a minute, it is page 47, Rule 99:

'When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with the flagman's signals a sufficient distance to insure protection, taking two torpedoes and when necessary, in addition displaying lighted fusees, and when recalled and safety to the train will permit, he may return. When conditions require, he will leave the torpedoes and a lighted fusee. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection, by night or by day, when the view is obscured lighted fusees must be thrown off at proper intervals. When day signals cannot be plainly seen owing to weather or other conditions, night signals must be used. Conductors and Engineers are responsible for the protection of their trains.' (R. 149.)

Q. Now, you spoke of a general rule, 108; would that as a general rule be applicable under the facts as I have stated them to you?

MR. McKEVITT: Objected to as incompetent, irrelevant and immaterial and for the additional reasons heretofore stated.

THE COURT: He may answer.

A. Yes sir.

MR. SHONE: We offer in evidence rule 108 of the consolidated code of operating rules and general instructions.

MR. McKEVITT: We object to that as incompetent and immaterial and not within the issues of this case.

THE COURT: It may be admitted." (R. 150.)

* * *

"Q. Are there any other rules in this rule book that we are speaking about which in your opinion would govern the circumstances and facts as I have stated them to you?

MR. McKEVITT: I want to object to the form of the question and object to it on the ground that it is vague and uncertain and on the ground that it is not within the issues of this case.

THE COURT: He may answer.

A. Yes, there would be another one.

Q. What one?

A. Rule 101.

MR. SHONE: We offer in evidence rule 101.

MR. McKEVITT: We object on the grounds previously stated with reference to the other rules.

THE COURT: It may be admitted and you may read it into the record. (R. 151.)

MR. SHONE: Rule 101 which plaintiff has offered as an exhibit and found on page 50 of the

consolidated code of operating rules and general instructions reads as follows:

'Trains must be fully protected against any known condition not covered by the rules, which interferes with their safe passage'." (R. 152.)

SUMMARY OF ARGUMENT

1. Appellant thinks it clear that the decedent engineer was guilty of negligence as a matter of law because of his violation of Rule 93. This rule, with the accompanying definition of restricted speed, was a *specific* and not a *general* rule of operation, and subject to interpretation by the District Court as a matter of law and not for jury determination. That this rule was violated cannot be challenged. Deceased did not have his train under the control required by the rule. If he had obeyed this rule there would have been no collision. His duty was as clear as its performance was easy. His breach of duty constituted the sole and efficient cause of his death. Therefore, the District Court should have granted appellant's motion for a directed verdict. (Specification of Error No. 1.)

Southern Ry. Co. vs. *Hylton,* (6th Cir.) 37 F. (2d) 843;

Southern Ry. Co. vs. *Hylton,* (6th Cir.) 87 F. (2d) 393 (same case);

Unadilla Valley Ry. Co. vs. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224;

St. Louis, Southwestern Ry. Co. vs. *Simpson,* 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152;

Van Derveer vs. *Delaware, L. & W. R. Co.,* (2nd Cir.) 84 F. (2d) 979;

Paster vs. *Penn. R. R.,* (2nd Cir.) 43 F. (2d) 908;

Great Northern Ry. Co. vs. *Wiles, Adm.,* 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732;

Miller vs. *Central R. Co. of N. J.,* (2nd Cir.) 58 Fed. (2d) 635;

Pere Marquette Ry. Co. vs. *Haskins* (6th Cir.), 62 Fed. (2d) 806;

Atchison T. & S. F. Ry. Co., vs. *Ballard,* (5th Cir.) 108 Fed. (2) 768;

Aetna Cas. & Surety Co. vs. *Yeatts* (4th Cir.) 122 Fed. (2d) 350.

2. The District Court should have granted appellant's motion to set aside the verdict and judgment. (Specification of Error No. 2.)

3. In the alternative the District Court should have granted appellant's motion for a new trial. (Specification of Error No. 2.)

4. The record is devoid of any evidence of negligence on the part of the appellant, its agents or employees, which could be said to have been a contributing cause to the death of the engineer. While the

case was submitted to the jury on presumably four separate acts of alleged negligence on the part of the appellant, in reality they boil down to two specific charges:

(1) Failure to provide deceased engineer with a safe place to work; and

(2) Violation of Operating Rules 99, 101 and 108. (Ex. 24.)

5. The District Court should have specifically instructed with reference to Rule 93 as requested in appellant's Requested Instruction No. 6. (Specification of Error No. 4.)

6. The District Court should have withdrawn from the jury's consideration the alleged failure of the appellant to furnish decedent with a safe place to work. (Specification of Error No. 5.)

7. The District Court should not have submitted for jury consideration the alleged violation by appellant of Rules 99, 101 and 108. (Specification of Error No. 6.)

8. The District Court should have sustained the objection of appellant's counsel to the introduction of the expert testimony given by appellee's witness Maury touching the application of Rules 99, 101 and 108. (Specification of Error No. 7.)

ARGUMENT

The appellee's action is barred by the negligence of the deceased which was the sole and efficient cause of his death. (Specifications of Error Nos. 1 and 2.)

As will be seen from appellant's Statement of the Case and Summary of Argument, the action in the main was based on two grounds:

(1) Failure to furnish deceased with a safe place to work; and

(2) Violation by appellant company of three operating rules of the company.

The appellant anticipates that appellee will contend there was an additional ground of negligence, viz: the failure of the dispatcher at East Lewiston, Idaho, to apprise the crew members of Extra No. 1648 that Extra No. 6015 was proceeding easterly towards Arrow Station, and to apprise the crew members of Extra No. 6015 that Extra No. 1648 had left ahead of that train. In this regard appellee's witness, David A. Livingstone, a brakeman on No. 1648, testified as follows:

> "Q. Mr. Livingstone, were you or were you not notified that Extra No. 6015 was proceeding easterly toward Arrow Station on November 11, 1951?
>
> A. No, we were not notified.

Q. By 'we', who do you mean?

A. The whole crew; none of the crew so far as I know.

Q. That was the crew of Engine No. 1648?

A. Yes." (R. 50-51.)

As to the failure to give notice to the crew members of No. 6015, appellee's witness, Frank A. Reisenbigler, fireman on that train, testified as follows:

"Q. When your crew left East Lewiston were you notified or any of your crew notified that Extra No. 1648 had left Lewiston for Arrow Station?

MR. McKEVITT: We object to that on the ground that there was no legal obligation on the part of the railroad to so notify them.

THE COURT: He may answer.

A. We received no notice that I recall.

Q. Was there a dispatcher at East Lewiston, a Northern Pacific dispatcher?

A. Yes.

Q. And if notice was given would that be imparted to the conductor, engineer and fireman?

A. Yes, sir." (R. 79.)

* * *

"Q. At any time before the collision with train No. 1648 had you or your crew been notified that No. 1648 was at Arrow Station, or ahead of you?

A. No.

Q. You had not?

A. No." (R. 80.)

As will be seen from the authorities heretofore cited and hereinafter quoted no such duty devolved upon the company, and even if it had, it did not absolve the deceased engineer from complying with Rule 93. Furthermore, the complaint contained no specific allegation of negligence in this regard, nor was there any operating rule of the company that required such notice to be given to crew members of extra trains.

As to the alleged failure of the appellant company to furnish the deceased with a safe place to work, suffice it to say that this could only refer to defective train equipment or right of way conditions. In this regard we respectfully request this Honorable Court to refer to subdivisions 2, 3, 4, 5, 6, 7, 8 and 9 of paragraph V of the complaint, all of which were withdrawn from jury consideration. There was no defect in operating equipment; there was no defect in roadbed, any or either of which was a contributing cause to the death of the engineer; in short, failure to furnish the deceased with a safe place to work was not

and could not have been an issue in this case despite the fact that the District Court submitted the same for jury determination.

This Honorable Court will observe that the Instructions given by the District Court were of a general nature. On the vital question as to what constituted *a safe place to work* no specific instruction was given; simply the statement that

> "An employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work, and that he may rely and act on this assumption."

When the District Court withdrew on appellant's request subdivisions 2, 3, 4, 5, 6, 7, 8 and 9 of paragraph V of the complaint, the issue that appellant had failed to furnish the deceased engineer with a safe place to work went out of the law suit. What then remained? Answer: One or possibly two questions for jury determination:

(a) Did appellant violate Rules 99, 101 and 108, and, if so, was such violation a contributing cause to the engineer's death?

(b) Was it required that the dispatcher at East Lewiston should have notified the respective members of the crews of No. 1648 and No. 6015 as to the relative locations of both trains at given times and given places?

Rules 99, 101 and 108 have already been set forth herein. It is quite apparent that these rules deal solely and alone with the operation of trains outside of yard limits. They are general operating rules as distinguished from specific operating rules. In this connection the attention of this Honorable Court is invited to the case of

> *Atchison, T. & S. F. Ry. Co.* vs. *Ballard,* (5th Cir.) 108 Fed. (2d) 768.

In the case referred to an engineer brought action for injuries sustained when his train collided with a standing train within yard limits. It was twice before the Fifth Circuit Court of Appeals. (First appeal, 100 Fed. (2d) 162; therein the Court said:

> "Rule 494 provides as to firemen: They must assist in keeping a constant lookout upon the track and must instantly give the engineman notice of any obstruction or signal they may perceive."

Appellant quotes the pertinent portions of the opinion on the second appeal (Hutcheson, Circuit Judge):

> "When this case was here before (100 Fed. (2d) 162) it was on an appeal from a judgment on a verdict directed against appellant then, appellee now, on the ground that the primary cause of the 'collision' was the negligence of plaintiff, in not operating his train at restricted speed, within the yard limits of the station at Hagerman.

> On this appeal, the railway company, assigning other grounds too, still insists that the verdict should have been directed for it on that ground. We thought then, that the case was not one for a direction. We thought then, that since, under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51 et seq., contributory negligence on the part of an employee, is not a bar to, but only diminishes recovery, the case was one for a jury verdict. Fully recognizing the laboring oar they pull, in endeavoring to have us reverse our former judgment, appellant yet vigorously maintains that: the case is one of an employee causing his own injury through direct violation of a positive, specific rule; and that within the authorities, his negligence must be considered the sole proximate cause of his injury, even though the fireman was negligent in failing to keep a proper lookout. (Citing cases.)''

Analyzing the position of the railway company, the learned Court went on to state that the case was one for a jury verdict

> "upon whether there was negligence of the fireman which concurred with that of the plaintiff (engineer) to cause the collision, we overruled appellant's assignment that a verdict should have been directed for it."

The *Atchison* case, however, is direct authority for the contention of appellant that the sole and efficient cause of the death of Engineer Mely was his violation of Rule 93. In reversing and remanding a judgment for the plaintiff, the Circuit Court of Appeals of the Fifth Circuit used the following language:

"We think appellant (railway company) is right. It is true that a violation of company rules for the conduct of its employees, general in terms, will not ordinarily constitute negligence as matter of law. Nor will observance of such rules, as matter of law, necessarily be due care, but it will be for the jury to say, considering the rules along with the evidence as a whole, whether there was negligence. (Citing cases.) A violation of specific rules, though, will constitute negligence just as their observance by others will, in relation to the violator, constitute due care. (Citing cases.) Thus, as applied to the question at issue, if the rule for keeping the train at restricted speed had stopped there, without more, it would have left the matter greatly one of judgment and it would be a question of fact under the opinion of witnesses qualified to give opinions, whether in the particular case there was negligence in failing to observe it. But where, as here, there is a precise definition of restricted speed, the question of what the rule means and requires is a question of law for the court, and the evidence of plaintiff himself showing that the train was not proceeding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant. But, because of the issue made on the negligence of the fireman it was also the duty of the court to instruct the jury that if, on the other hand, they believed that the fireman was also negligent in not keeping a proper lookout, or in not properly advising plaintiff of the obstruction on the track, and this negligence concurred with plaintiff's negligence, they should award plaintiff recovery but dimin-

ish the amount of it by such sum in proportion to the total injuries, as the negligence attributable to him bears to the negligence of the fireman.

Appellant, in charge after charge, requested the court to do this, and in addition, objected to the form of the general charge. This, instead of instructing directly upon the rule, as to restricted speed, its meaning and effect, that it had been violated, and that its violation was negligence, submitted to the jury, whether or not it had been violated, and whether, if it had been, the violation was negligent. Thus, there was error in submitting an issue as to the legal effect of the violation of this rule when it was the duty of the court to direct the jury, that its violation by plaintiff would be negligence. And there was error, too, in failing to instruct the jury that on the undisputed facts, plaintiff had violated it."

* * *

"A careful consideration of the evidence convinces us that the rule requiring an engineer to operate his train at restricted speed within yard limits, is, in the light of the definition in the rules not 'very indefinite', but most definite; that Rules 93 and D-153 are not in conflict with Rule 99, but complementary thereof. We think it quite plain, too, that within the authorities *Little Rock & M. R. Co. v. Barry,* 8 Cir., 84 F. 944, 43 L. R. A. 349; *Southern Ry v. Hylton,* 6 Cir., 37 F. 2d 843; they imposed a specific duty upon plaintiff to watch out for the train ahead, within the yard limits, and to so run his train, that he could stop it when necessary to avoid running into the train ahead. They imposed no duty on the train crew ahead to look out for him. Rules 93 and D-153, both state positively 'within yard limits, trains and engines may use the main

track, not protecting against second or third class trains or extra trains. * * * All except first class trains will move within yard limits at restricted speed. *The responsibility for accident with respect to second or third class trains rests with the approaching train.'* (Italics supplied.) Then the rule defined restricted speed—'*Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced.*' (Italics supplied.) A rule of similar purport covering movement of vessels in a fog, has been uniformly construed as premptory, its violation negligent, if a ship is at such speed as to be unable to stop within the distance other vessels can be seen. The Anna, 5 Cir., 297 F. 182, 184. Without any rule, the courts have held, that automobiles traveling where vision is obscured, must be kept at such speed as to be able to stop within the distance within which an obstruction may be seen. (Citing cases.)

Plaintiff's train was not a first class train but an extra. The rules were made to cover such trains as his. He knew that Extra 1146-East was ahead of him and he knew that because of the curve, he would not be able to see a train standing at the station until within 1,000 ft. of it. Knowing all of this, instead of bringing his train to restricted speed, and proceeding under it, he, according to his own testimony, merely reduced it from the 25 miles per hour, at which he was traveling, down to an estimated 12 to 15 miles per hour, a speed which according to his own testimony, would require 1,400 to 1,500 ft. to stop in. Assuming that plaintiff's testimony as to the rate of speed at which he was running was true (though it hardly seems reasonable that a train running at only 12 to 15 miles per hour, could not be stopped by the application of the emergency, under 1,500 ft.), we think it is contrary to

common sense to contend that the train when running in yard limits at a speed which requires 1,500 ft., merely a third of a mile to stop in, was running at restricted speed under the rule. A verdict that it was, would we think, be wholly without support in the evidence."

* * *

"We think it quite plain too, that Rules 93-99, are not in conflict with, but are complementary of each other. Rule 99 is general, Rule 93 is particular. Rule 99 applies to every case except that dealt with in Rules 93 and D-153. Those rules control special cases. It was not necessary, therefore, for the crew of 1146-East, to put out signals, look out for or otherwise protect against Extra 1146, within the yard limits of Hagerman. The case did not come under Rule 99 providing: 'When a train stops under circumstances in which it may be overtaken by another train', for under Rule 93 and D-153, there were no circumstances under which 1146-East might be overtaken by Extra S-41. The responsibility for avoiding a collision was on plaintiff's train and not on 1146-East. Its crew was expressly excused from protecting against the following train. It was error to submit the question of the negligence of its members to the jury."

It will be observed that Rules 93 and D-153, referred to in the foregoing opinion, are substantially the same, if not identical with Rule 93, and the definition of restricted speed, of the Operating Rules of the appellant railway company heretofore set out.

Were it not for the fact that the evidence in the *Atchison* case, *supra,* disclosed that the fireman on

the train involved had violated an operating rule of the company, unquestionably the Court of Appeals in that case would have held that the violation by the engineer of the restricted speed rule was the sole and efficient cause of his injury.

In the case at bar there is an utter absence of proof that any operating rule promulgated for the protection of Engineer Mely was violated by the appellant, its agents or employees.

It will be kept in mind that Rules 99, 101 and 108, the alleged violations of which were heavily relied upon by appellee, had no application to trains being operated *within yard limits*. This is established in the cross examination of appellee's so-called expert witness Maury:

> "Q. Now, Mr. Maury, will you turn to page 44 of the rule book—do you have the page?
>
> A. Yes, sir.
>
> Q. It is your understanding, is it not, that this unfortunate collision occurred within yard limits?
>
> A. Yes, sir. (R. 158.)
>
> Q. What, as an experienced conductor—brakeman and conductor—is meant by yard limits?
>
> A. It means that a train working inside of those limits does not have to protect against other trains.

Q. And when you say a train working within yard limits does not have to protect against other trains, you are referring, are you not, to train No. 1648, Eddie Feehan's train?

A. That's right.

Q. And you are referring to the fact that it was not incumbent upon him, under the rules, to protect his train against extra No. 6015, isn't that right?

A. In a way, yes.

Q. Totally yes. Now, will you kindly read rule 93?

A. 'Within yard limits the main track may be used clearing first class trains when due to leave the last station where time is shown. In case of failure to clear the main track, protection must be given as prescribed by rule 99. Within yard limits the main track may be used without protecting against second or inferior class, extra trains and engines.'

Q. Just a moment, stop there. 'Within yard limits the main track may be used without protecting against second and inferior class, extra trains and engines.' That rule was in effect November 11, 1951, was it not?

A. Yes, sir.

Q. Both of these trains were within the yard limits, as you know?

A. Yes. (R. 159.)

Q. What is meant by the language 'against extra trains'?

A. 'Protection against extra trains' or 'without protecting against extra trains' means that you don't have to have a flagman out.

Q. That means that it was not the duty of Eddie Feehan to send any brakeman back to put out a fusee, or a flare or a torpedo on the day in question?

A. That's right." (R. 160.)

* * *

"Q. Now, just assume that you were similarly placed, as was Eddie Feehan—by the way, do you know that that train was about to move out of Arrow, that the air was cut in, the Engineer was in the cab and they were about to depart?

A. That is what I heard.

Q. Assuming that you were in charge of the train, such as Eddie Feehan was, under those conditions, as a conductor on the P & L branch, during the time that you say you operated, did you ever do what you have just described as sometimes done, at Arrow?

A. Not at Arrow. (R. 161.)

Q. No; now will you read the following paragraph on page 44, the fourth paragraph? No, it is paragraph 3.

A. 'Within yard limits second and inferior class, extra trains and engines must move at restricted speed.'

Q. Within yard limits second and inferior class, extra trains and engines must move at restricted speed. What train was controlled—what Engi-

neer was governed by that Rule on November 11, 1951, in connection with this accident?

A. Both engineers on both trains.

Q. Did that rule govern and control Engineer Mely?

A. Yes, sir." (R. 162.)

* * *

"Q. Under the rules, then, that were in effect on that date, the engineer sees that warning sign, and knowing that there is a yard limit board further to the east, there is some duty devolved upon him, is there not?

A. Yes, sir.

Q. What duty was there on that date on Engineer Mely?

A. I would say to be alert.

Q. You say to be alert, that is one thing—is that all; that means just to look and see, and be able to see what is going on? In addition to being alert what else is he called upon to do, if anything? Maybe I can refresh your recollection by repeating: 'Within yard limits second and inferior class, extra trains and engines must move at restricted speed'?

A. Oh, yes, of course, that is up to his judgment.

Q. In other words, it is up to him to determine whether or not he is moving at restricted speed?

A. That's right.

Q. Kindly turn to, under the heading 'definitions' in the rule book on page 8?

A. Yes, I have it.

Q. Do you see a heading there, 'restricted speed'?

A. Yes, sir.

Q. Will you kindly read that to the Court and jury?

A. 'Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced.' (R. 163.)

Q. 'Proceed prepared to stop short of train, obstruction or anything that may require the speed of a train to be reduced.' That rule controlled Engineer Mely on that date, did it not?

A. I would say so; yes.

Q. And if it was necessary to reduce the speed to ten miles an hour, under that rule, he was required to do it, was he not?

A. Yes, sir.

Q. In other words, under that rule, is it not a fact that it was Engineer Mely's duty to have that train under such control that when he applied the brakes he could stop short of the rear end of the caboose into which his engine crashed —that was his duty, wasn't it?

A. Yes.

Q. In other words, is it not a fact that the warning Board is an extra caution to him? When he hits that sign it warns that at a further distance east is the yard limit board, then he should begin to get his train under absolute control, shouldn't he, before entering the yard limits.

A. Yes, sir; I would say so.

Q. You have referred to rule 99, and his Honor has read it and it has been read; now, isn't it a fact, Mr. Maury, that that rule refers to train operation outside of the yard limits?

A. That isn't what it says in the book Mr. McKevitt.

MR. McKEVITT: Will you read the question, Mr. Reporter? (R. 164.)

Q. Now, that can be answered 'yes' or 'no'.

A. No, it doesn't. I never realized I answered like that.

Q. Is it your testimony that that rule refers to trains within the yard limits and also without the yard limits?

A. Under certain circumstances, yes sir.

Q. Circumstances that are referred to there where the language is used, 'When a train stops under circumstances in which it may be overtaken by another train' means this, does it not—you are familiar with the fact that when you leave this bridge there is an area in here where there is no yard limit, is that right?

A. Yes.

Q. The circumstances that are referred to in that rule are these: That if Eddie Feehan's train for some reason or other had stalled in this area outside of yard limits—those are the circumstances that would require him to go back and protect against No. 6015, that's true, isn't it?

A. Yes. What I mean, Mr. McKevitt, it doesn't refer to yard limits in Rule 99.

Q. That's exactly what I am talking about. Rule 99 does not refer to yard limits, does it?

A. It just says any place.

Q. What I am asking you, you have one rule that is a yard limit rule, don't you?

A. Yes, sir.

Q. That is 93?

A. Yes.

Q. Then you have 99?

A. Yes, sir.

Q. You know, Mr. Maury, that 99 doesn't refer to yard limits because you have a separate yard limit rule; you know that, don't you?

A. Yes, sir.

Q. Isn't it a further fact that rule 99 only requires you to flag against first class trains within yard limits?

A. That's right, sir.

Q. And No. 6015 and No. 1648 were not first class trains, we are agreed on that?

A. That's right." (R. 166.)

In *Miller* vs. *Central R. Co. of N. J.,* (2nd Cir.), 58 Fed. (2nd) 635, it is said:

"Nor are those decisions in point which hold that the crews of an 'inferior' train are not entitled to information of the whereabouts of others that they may meet. *Rosney v. Erie R. Co.,* 135 Fed. 311 (C. C. A. 2); *Great North. R. v. Hooker,* 170 Fed. 154 (C. C. A. 8); *Chicago R. I. & P. Ry. Co. v. Ship,* 174 Fed. 353 (C. C. A. 8); *Central R. Co. of New Jersey v. Young* (C. C. A. 3) 200 Fed. 359, L. R. A. 1916E, 927. These involved yards where such information is impracticable and probably worse than idle."

In *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224

the Supreme Court of the United States, speaking through Mr. Justice Holmes, reversed a decision of the Court of Appeals of New York in favor of a conductor in charge of a train who was killed in a head-on collision. The action was under the Federal Employers' Liability Act and the only question presented to the Supreme Court of the United States was whether the death resulted, in whole or in part from the negligence of any of the employees of the carrier,

within the meaning of the act. The pertinent portion of the opinion is as follows:

> "Caldine was conductor of train No. 2 upon a single track that passed through Bridgewater. He had printed orders that his train was to pass train No. 15 in Bridgewater yard, and that train No. 15 was to take a siding there to allow No. 2 to pass. The order was permanent unless countermanded in writing by the superintendent. Its purpose to prevent a collision was obvious, and there was no excuse for not obeying it. But this time, after reaching Bridgewater, instead of waiting there as his orders required him to do, Caldine directed his train to go on. The consequence was that at a short distance beyond the proper stopping place his train ran into train No. 15, rightly coming the other way, and he was killed. The facts relied upon to show that the collision was due in part to the negligence of other employees are these: The conductor of No. 15 generally, or when he was a little late in arriving at a station about 2 miles from Bridgewater, would telephone to the station agent at Bridgewater that he was coming. He did so on the day of the collision. The station agent who received the message testified that he told the motorman of No. 2, but the motorman denied it. At all events the deceased, the conductor of No. 2, did not receive the notice. It is argued that the failure to inform the conductor, and the act of the motorman in obeying the conductor's order to start, if, as the jury might have found, he knew that train No. 15 was on the way, were negligence to which the injury was due at least in part. It is said that the motorman should have refused to obey the conductor, and should have conformed to the rule, and that his act in physically starting the car was even more immediately connected with the colli-

sion than the order of the deceased. The phrase of the statute, 'resulting in whole or in part', admits of some latitude of interpretation and is likely to be given somewhat different meanings by different readers. Certainly the relation between the parties is to be taken into account. It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts. See *Davis v. Kennedy*, 266 U. S. 147, 69 L. ed. 212, 45 Sup. Ct. Rep. 33.

Still considering the case as between the petitioner and Caldine, it seems to us even less possible to say that the collision resulted in part from the failure to inform Caldine of the telephone from train No. 15. A failure to stop a man from doing what he knows that he ought not to do hardly can be called a cause of his act. Caldine had a plain duty, and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey.''

St. Louis Southwestern Ry. Co. vs. Simpson, 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152, an action under the Federal Employers' Liability Act, a railroad engineer disregarded a train order to remain on a siding

until another train had passed, in consequence of which the trains collided head-on. His administratrix relied on the Last Clear Chance Doctrine. The Supreme Court, speaking through Mr. Justice Cardozo, said:

> "The facts so summarized are insufficient to relieve the engineer from the sole responsibility for the casualty that resulted in his death. What was said by this court in *Davis v. Kennedy,* 266 U. S. 147, 69 L. ed. 212, 45 S. Ct. 33, might have been written of this case. 'It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.' See also *Unadilla Valley R. Co. v. Caldine,* 278 U. S. 139, 73 L. ed. 224, 49 S. Ct. 91; *Frese v. Chicago, B. & Q. R. Co.,* 263 U. S. 1, 3, 68 L. ed. 131, 132, 44 S. Ct. 1; *Great Northern R. Co. v. Wiles,* 240 U. S. 444, 448, 60 L. ed. 732, 734, 36 S. Ct. 406."

The case of *Van Derveer vs. Delaware, L. & W. R. Co.,* (2nd Cir.) 84 Fed. (2d) 979, was an action for wrongful death under the Federal Employers' Liability Act. The deceased conductor was killed when a freight car on which he was riding during switching operations was side-swiped by a locomotive on an adjoining track after the freight conductor had changed

two switches lined up for the movement of the locomotive and cars on the adjoining track, in violation of a railroad rule. In affirming a judgment dismissing the complaint entered on the direction of a verdict at the close of the evidence, L. Hand, Circuit Judge, speaking for the Court, said:

> "The plaintiff insists that there was a question of fact about the meaning of the rule; that is, that the jury might have found that Train No. 52 had 'stopped.' But the meaning is perfectly plain; it is that unless the movement for which the switches have been 'lined-up' shall be over, so that that 'line-up' will not be needed any more, they shall not be touched without consent. That is so plainly the common-sense of the matter that no jury should be allowed to find otherwise. We do not indeed find in the record explicit testimony that Van Derveer knew that the locomotive was to drop the rear nineteen cars and go back to 'Running Track No. 1'. But the fact was so and for that reason he could not have 'made sure' of the contrary. Besides, the operation was plainly drilling in the yard and the locomotive would normally go back to the thirty-five cars on the running track. Indeed the plaintiff has not argued otherwise. Therefore the only question is whether Van Derveer's breach of the rule bars the action.
>
> When an injury to one employee results from the combined fault of himself and a fellow-worker, the damages are divided (section 53, title 45, U. S. Code (45 U. S. C. A., Sec. 53)); but an exception has grown up when the injured employee's fault is the violation of a rule or an express instruction. *Great Northern R. Co. v. Wiles,*

240 U. S. 444, 36 S. Ct. 406, 60 L. ed. 732, is scarcely an instance, though sometimes cited as such. It is better classed as a case where the injured person, having before him the consequences of another's fault, does not do what he can to avoid them. The exception first appeared, so far as we can find, in *Frese v. Chicago B. & Q. R. Co.,* 263 U. S. 1, 44 S. Ct. 1, 68 L. ed. 131, where a locomotive driver failed to stop his train at a crossing, as required by a rule of the road. He was of course on the right side of his cab and his fireman was on the left, whence came the colliding train; the court seemed to think it doubtful whether the fireman had kept a bad lookout, but went on to say that since the duty was primarily the driver's, it was irrelevant whether he had or not. It has at times been questioned whether the decision should not be limited to situations where the injured person is the superior of the other employee on whose fault he must rely to recover.

That would explain not only *Frese v. Chicago, B. & Q. R. Co.,* supra, but *Unadilla Valley Ry Co. v. Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. ed. 224, because the deceased conductor directed the driver to go on, contrary to the rule. True, the dispatcher was also negligent in that case in failing to tell the conductor that the train with which he collided was approaching, but the court said that the message would have merely given the conductor another motive to obey the rule. It is a little hard to see why that might not have been enough to have induced obedience, but if the contrary was intended, the decision is consistent with the supposed gloss. When the same accident was before us in *Unadilla Valley Ry. Co. v. Dibble,* 31 F. (2d) 239, we applied the doctrine to the driver whom the conductor had directed to break

the rule; and that was plainly wrong if the doctrine is limited as suggested. In *Davis v. Kennedy,* 266 U. S. 147, 45 S. Ct. 33, 69 L. ed. 212, it did not appear that the negligent fellow workers were under the driver's authority, and almost certainly they were not; therefore it also seems contrary to the limitation. The Sixth Circuit held the same thing in *Southern Ry. Co. v Hylton* (C. C. A.) 37 F. (2d) 843, and we did so again in *Paster v. Pennsylvania R. R.,* 43 F. (2d) 908. *Southern Ry. Co. v Youngblood,* 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124, turned upon the absence of any other negligence than the deceased's. In *Rocco v. Lehigh Valley R. Co.,* 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743, the deceased had failed to ask the position of a train that he was to meet as required by a rule, though had he learned where it was he might rightfully have gone on to meet it. This fault was treated as only an element in determining his general negligence; but if the rule had directed him to wait where he was, Roberts, J. says (288 U. S. 275, at page 279, 53 S. Ct. 343, 77 L. Ed. 743), that the action would have failed. Thus there is no such gloss as that we have been discussing, and the doctrine is merely that if the injured employee has contributed to his injury by the breach of a rule or an instruction ad hoc, he cannot recover. By reason of the phrase, 'Contributory negligence,' in section 53 (45 U. S. C. A.), it might have been possible to put such an exception on the ground that indiscipline is not 'negligence', a word more properly confined to inattention to one's safety. But that has never been suggested as the reason, and we should hesitate to ascribe it to the court. Moreover, it is not in any case our province to do more than ascertain the extent of the doctrine. We are satisfied that it speaks generally, what-

ever the reason, and that the judge was right to direct a verdict. Judgment affirmed."

Appellant has not quoted from all of the cases heretofore cited since it does not wish to unduly lengthen this brief; suffice it to say, however, that all involve specific rule violations.

Concluding this portion of the argument, appellant states categorically that counsel for appellee, under the record in this case, will be unable to point to one single act of negligence on the part of appellant which could be said to have contributed, in whole or in part, to the death of Engineer Mely.

ARGUMENT IN SUPPORT OF MOTION FOR NEW TRIAL

SPECIFICATION OF ERROR NO. 2

In the several grounds urged in its motion for a new trial appellant asserted that the verdict and judgment were contrary to the weight of the evidence; that there was no substantial evidence that the defendant was guilty of negligence, which negligence, in whole or in part, contributed to the death of appellee's husband.

The motion to set aside the verdict and grant a new trial is addressed to the discretion of the trial Judge and should be granted even though there be substan-

tial evidence supporting the verdict if, in his opinion, the ends of justice so require.

Aetna Cas. & Surety Co. vs. Yeatts, (4th Cir.) 122 Fed. (2d) 350.

SPECIFICATION OF ERROR NO. 4

That the District Court should have specifically instructed the jury in accordance with defendant's Requested Instruction No. 6 is borne out by the following language in *Atchison, T. & S. F. Ry. Co. vs. Ballard,* 108 Fed. (2d) 768:

> "A violation of specific rules though, will constitute negligence just as their observance by others will, in relation to the violator, constitute, due care. * * * But where, as here, there is a precise definition of restricted speed, the question of what the rule means and requires is a question of law for the court, and the evidence of plaintiff himself showing that the train was not proceeding at restricted speed within the definition, it was the duty of the court to say so, and to instruct the jury; that plaintiff was himself negligent in violating the rule of restricted speed; and that if the jury believed that that violation was the sole proximate cause of the injury, they should find a verdict for defendant.
> * * *
>
> "Appellant, in charge after charge, requested the court to do this, and in addition, objected to the form of the general charge. This, instead of instructing directly upon the rule, as to restricted speed, its meaning and effect, that it had been violated, and that its violation was negligence,

submitted to the jury whether or not it had been violated, and whether, if it had been, the violation was negligent. Thus, there was error in submitting an issue as to the legal effect of the violation of this rule when it was the duty of the court to direct the jury that its violation by plaintiff would be negligence. And there was error, too, in failing to instruct the jury that on the undisputed facts plaintiff had violated it."

SPECIFICATION OF ERROR NO. 5

The submission to the jury of the question of the alleged failure on the part of appellant to furnish the engineer with a safe place to work was not justified by the evidence. Since there was no defect in the mechanical equipment nor in the roadbed, the engineer had been furnished with a safe place in which to work.

SPECIFICATION OF ERROR NO. 6

The alleged violation of Operating Rules 99, 101 and 108 should not have been submitted to the jury. These rules refer to operation of trains outside of yard limits. This is borne out by a reading of the rules themselves as contrasted with Rule 93 and likewise by the testimony of plaintiff's so-called expert, Maury, hereinbefore quoted.

This contention finds support in the following language from the *Atchison* case:

"We think it quite plain, too, that Rules 93-99, are not in conflict with, but are complementary of, each other. Rule 99 is general, Rule 93 is particular. Rule 99 applies to every case except that dealt with in Rules 93 and D-153. Those rules control special cases. It was not necessary, therefore, for the crew of 1146-East, to put out signals, look out for or otherwise protect against Extra 1146, within the yard limits of Hagerman. The case did not come under Rule 99, providing: 'When a train stops under circumstances in which it may be overtaken by another train,' for under Rule 93 and D-153, there were no circumstances under which 1146-East might be overtaken by Extra S-41. The responsibility for avoiding a collision was on plaintiff's train and not on 1146-East. Its crew was expressly excused from protecting against the following train. It was error to submit the question of the negligence of its members to the jury."

Rules 93 and 99 above referred to are substantially similar if not identical with Rules 93 and 99 in the case at Bar.

SPECIFICATION OF ERROR NO. 7

The Court should have sustained appellant's objection to the introduction of expert testimony through the witness, Maury, touching the meaning and application of the several operating rules in question. These rules were not in conflict; they were clear and unambiguous. In this connection we again refer to the *Atchison* case:

"A careful consideration of the evidence con-

vinces us that the rule requiring an engineer to operate his train at restricted speed within yard limits is, in the light of the definition in the rules not 'very indefinite,' but most definite; that Rules 93 and D-153 are not in conflict with Rule 99, but complementary thereof. We think it quite plain, too, that within the authorities, *Little Rock & M. R. Co., v. Barry,* 8 Cir., 84 Fed. 944, 43 L. R. A. 349; *Southern Ry. v. Hylton,* 6 Cir., 37 F. 2d, 843; they imposed a specific duty upon plaintiff to watch out for the train ahead, within the yard limits, and to so run his train that he could stop it when necessary to avoid running into the train ahead. They imposed no duty on the train crew ahead to look out for him."

CONCLUSION

But one conclusion can be drawn from the undisputed evidence and from the uncontroverted physical facts disclosed by the record, viz: that the death of Engineer Mely was due solely and alone to his violation of Rule 93. In any event, appellant assuredly is entitled to a new trial for the reasons hereinbefore stated.

Dated at Spokane, Washington, this 8th day of January, 1954.

Respectfully submitted,

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